

In the Matter of License No. 16449

Issued to: RAGNAR EKLUND

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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RAGNAR EKLUND

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 19 September, 1949, an Examiner of the United States Coast Guard at New York City revoked License No. 16449 issued to Ragnar Eklund upon finding him guilty of "misconduct" based upon one specification and upon finding him guilty of "negligence" based upon a second specification. The "misconduct" specification alleges that while serving as Master on board the American S. S. EXMOUTH, under authority of the document above described, on or about 4 and 5 June, 1949, Appellant was unable to perform his duties, by reason of intoxication, while said vessel was being navigated on the high seas. The "negligence" specification alleges that while serving as above on or about 5 June, 1949, Appellant was in charge of the navigation of the EXMOUTH and he failed to keep clear of the Greek S. S. HELLENIC BEACH, which was the privileged vessel in a crossing situation, thereby contributing to a collision between the two vessels.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own selection and he entered a plea of "not guilty" to the charges and specifications.

After the Investigating Officer and Appellant had completed their opening statements, the Investigating Officer presented his case. He introduced in evidence the testimony of four witnesses and three exhibits. Appellant then moved to dismiss the charges and specifications. The Examiner reserved his decision on these motions but later denied them when they were renewed by Appellant after completion of the closing arguments.

In defense, Appellant testified under oath in his own behalf and also introduced in evidence four exhibits which include the testimony of two witnesses appearing at the earlier investigation.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant, the Examiner made his findings of fact in which he found that Appellant had properly performed his duties on 4 June, 1949, but that he was intoxicated on 5 June, 1949 and consequently, unable to perform his duties. Therefore, he concluded that the misconduct specification was "proved in part" and the charge of misconduct "proved." The Examiner found the negligence charge and specification "proved," and entered an order revoking License No. 16449 and all other licenses,

documents and certificates issued to Appellant by the United States Coast Guard. The order also provided that Appellant would be permitted to apply for a license as First Mate on or after six months after 19 September, 1949.

From that order, this appeal has been taken, and it is urged that:

Point 1. The Investigating Officer failed to carry the burden of proving the charges beyond a reasonable doubt. The testimony of the third mate and the helmsman was not "reliable, probative and substantial evidence" as required by 46 Code of Federal Regulations 137.21-5.

Point 2. In view of Appellant's exemplary record and the action taken in the East Wind case, revocation of Appellant's Master's License is an unusually severe order to impose.

Appearances: Haight, Deming, Gardner, Poor and Havens of New York City by James M. Estabrook and Walter A. Darby, Jr., of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 4 and 5 June, 1949, Appellant was serving as Master on board the American S. S. EXMOUTH, under authority of his License No. 16449. He had been acting in this capacity aboard the EXMOUTH, a Victory ship, for approximately a year and a half.

On 4 June, 1949, shortly after 1300, the EXMOUTH sailed from the port of New York bound for Philadelphia, Pennsylvania. Appellant remained at the conn until about 1510. He then went below and, except for several trips to the bridge to check the navigation of the vessel, he remained below until approximately 2030 when he was informed that fog was setting in and fog signals had been heard. The fog was very thick when Appellant appeared on the bridge. He resumed control of the ship's navigation, maneuvering at various speeds. At 2215, the anchor was dropped approximately one and a half miles southeast of the Overfalls Light Vessel at the entrance to the Delaware Bay. After the ship was properly anchored and the anchorage bearings had been checked, Appellant left word to call him when the fog lifted and went below again.

At 0130 on 5 June, 1949, the third mate was on watch and he notified Appellant that the fog had lifted. Appellant went to the bridge and found that it was clearing up. The wind was light, the sea smooth, the tide flood, and visibility about three miles. Thereupon, Appellant gave orders to weigh anchor and proceed toward the pilot station which was in a northwesterly direction from the position of the ship.

The anchor was aweigh at 0151. At this time, Appellant ordered the third mate to set a course so as to pass the Overfalls Light Vessel one-quarter to one-half of a mile abeam to starboard.

The EXMOUTH had been heading in a southeasterly direction while lying at anchor and she came around with "hard left" rudder because another ship had been anchored close aboard on her starboard side. At 0155, while coming around to 280 degrees true at full speed ahead (60 R.P.M. - 12 knots), Appellant noticed the white lights of several ships in the vicinity of the pilot station. At this time, the third mate saw the masthead, range and red running lights of a ship later ascertained to be the Greek S. S. HELLENIC BEACH and he called Appellant's attention to the ship's location and the fact that its red sidelight was visible. The HELLENIC BEACH was approximately three points on the starboard bow of the EXMOUTH when the latter ship had steadied on course 280. When first sighted, the HELLENIC BEACH was about three miles away from the EXMOUTH and on a southeasterly course. After the third mate had informed Appellant of the presence of this ship, Appellant instructed the mate to continue taking bearings on the Overfalls Light Vessel. The only alteration of course or speed before passing the Overfalls Light Vessel abeam, was a change of course to 275 degrees true.

At about 0200, the EXMOUTH passed the Overfalls Light Vessel abeam to starboard at a distance of between one-quarter and one-third of a mile. The HELLENIC BEACH was then approximately one and a half miles away and still showing her port side light. The bearing of the HELLENIC BEACH had remained constantly between three and four points on the starboard bow of the EXMOUTH. Appellant had anticipated making a change of course of about forty degrees to starboard so as to head for the pilot station after passing the Light Vessel abeam. At this time, the visibility had closed to about a mile and a half.

Just after passing the Light Vessel, Appellant ordered the helmsman to come "Hard left" to 311. Since the EXMOUTH was then on course 275, this order caused some confusion in the minds of the third mate and helmsman. Hence, they questioned Appellant as to whether he meant "Hard left" or "Hard right." Appellant told the third mate to check the course in the chart room. The mate did so and reported to Appellant that "Hard right" was the proper order to come to course 311. Appellant then ordered "Hard right". It was then 0203 and the HELLENIC BEACH was approximately one mile away and bearing four points on the starboard bow.

It was apparent from Appellant's unusual behavior that he was under the influence of alcohol when he appeared on the bridge at 0130. He was unsteady on his feet, his speech was thick and almost incoherent and he was not sure of himself when he gave orders.

The EXMOUTH had begun to swing to the right when the two vessels collided at 0205. The HELLENIC BEACH struck the EXMOUTH slightly forward of the number four hatch on the starboard side. The angle of the keels of the two ships was roughly forty-five degrees at the time of impact. The collision occurred about one and a half miles southwest of the Overfalls Light Vessel. The EXMOUTH was still running at full speed ahead when the two ships came together and she had not slackened speed at any time. During the entire period, from the time the HELLENIC BEACH had been first sighted and reported to Appellant until the time of the collision, the only side light of the HELLENIC BEACH perceptible to those on the EXMOUTH was the red running light. The bearing of the HELLENIC BEACH from the EXMOUTH had remained about constant as the two vessels closed rapidly. Visibility was about the same as it had been at 0200.

Appellant was on the starboard wing of the bridge at the time of the collision and the impact knocked him down. The third mate put the telegraph on "stop" and then helped Appellant to his feet. The general alarm was sounded and the crew was mustered at their boat stations. As soon as it was determined that the EXMOUTH would remain afloat, the ship was anchored. No loss of life resulted from the collision. Appellant sustained a concussion of the brain as a result of his fall at the time of the collision and, subsequently, he was hospitalized for eleven days in the United States Marine Hospital at Staten Island, New York.

Appellant is fifty-eight years old and has held a Master's license for the past twenty-six years. This is the first record of any disciplinary action having been taken against him. Appellant was awarded the Merchant Marine Distinguished Service Medal for his action in saving the entire personnel of his ship which was attacked and sunk by Japanese cruisers in 1942.

OPINION

Appellant contends that the charges of "misconduct" and "negligence" have not been proven "beyond a reasonable doubt." (Point 1) He has cited the case of Fredenberg v. Whitney (D.C. Wash., 1917), 240 Fed. 819,824, as authority for the statement that this proceeding is being conducted pursuant to a penal statute and, for this reason, Appellant must be found guilty "beyond a reasonable doubt." But the above case was decided prior to the 1936 Amendment of R.S. 4450 which completely revised the procedure with respect to investigations of marine casualties and disciplinary action under R.S. 4450 (46 U.S.C. 239). The Coast Guard has consistently held that the statute as amended in 1936 is remedial and not penal in nature. This position is fortified by the statute itself which provides for the referral of any evidence of criminal liability to the Department of Justice for action by that Department, thus recognizing and providing for the separability of the penal from remedial or administrative functions. In addition, the Administrative Procedure Act, section 7(c), and Title 46 Code of Federal Regulations, section 137.21-5, state that the degree of proof required is that the findings and conclusions be supported by substantial evidence - not by proof beyond a reasonable doubt.

Appellant also disputes the conclusion that the testimony of the helmsman and the third mate was "reliable, probative and substantial" as required by Title 46 Code of Federal Regulations, section 137.21-5. (Point 1)

To be substantial, the evidence need not point entirely in one direction but must be evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact that is sought to be sustained even though the evidence permits two or more possible inferences. Baltimore and Ohio Railroad Co. v. Postom (C.C.A., D.C., 1949), 177 F. 2d 53. It is such evidence that reasonable men may fairly differ as to whether it establishes the case, and if all reasonable men conclude that it does not do so, then it is not substantial evidence. Jenkins and Reynolds Co. v. Alpena Portland Cement Co. (C.C.A. Mich., 1906), 147 Fed. 641.

The reliability of the evidence and its probative value must also be taken into consideration. This means that even substantial evidence must be carefully weighed and evaluated in the light of

the credibility of the witnesses and the other common sense rules of probity and reliability which prevail in courts of law and equity. There are no real rules governing these two factors but there are certain standards and principles which people engaged in the conduct of responsible affairs instinctively understand and act upon.

The record indicates that the Examiner complied with these requirements and that there is reliable, probative and substantial evidence on which to base the findings and conclusions arrived at by him.

Both the third mate and the helmsman were on the bridge and able to observe Appellant from the time he arrived on the bridge until the collision occurred more than a half hour later. Their testimony, based on personal observation of Appellant, was the most reliable evidence obtainable since the Examiner found no reason to doubt its credibility. And the facts to which they testified tend to prove the allegations set forth in the two specifications. Hence, their testimony was both reliable and probative.

With respect to the "misconduct" specification, Appellant argues that there is not substantial evidence to prove that Appellant was intoxicated or that he was unable to perform his duties. Appellant specifically points out that the third mate did not testify that Appellant was intoxicated. But the third mate did testify that Appellant was unsteady on his feet and his speech was almost incoherent. And although the helmsman admitted that his memory was vague as to some other points, he stated definitely that Appellant was intoxicated. The helmsman also testified that Appellant's orders were confusing and that he gave orders and then corrected them; and the third mate testified that Appellant gave the order "Hard left" to 311 and then changed it to "Hard right" only after the third mate had corrected him and gone into the chart room to verify that Appellant's original order had been completely wrong. From these facts, it is apparent that Appellant did not properly perform his duties relative to the navigation of the ship and the logical inference is that he was unable to do so because of his intoxicated condition. As stated by the Examiner in his opinion:

"The only explanation, in the light of the testimony, and of Captain Eklund's unbelievable maneuvering leading to the casualty, is that he was intoxicated. A master of his experience would not have so acted unless his judgment was impaired and his reactions slowed to such an extent that his acts constituted flagrant negligence, endangering his vessel and crew and resulting in the collision."

Concerning the question of substantial evidence in connection with the charge of "negligence", it is my opinion that the findings of fact set out, supra, are adequately supported by the evidence contained in the record, particularly by the testimony of the helmsman and third mate.

It is not disputed that the weather was clear and visibility good; that the third mate called Appellant's attention to the bearing of the HELLENIC BEACH at 0155 when the latter ship was about three miles distant; that the red running light of the HELLENIC BEACH was the only side light of the latter ship visible to those on board the EXMOUTH; that Appellant was in charge of the navigation of the EXMOUTH and steered the ship on a collision course without reducing speed at

any time; and that the EXMOUTH failed to keep clear of the HELLENIC BEACH even though the latter was the privileged vessel in a crossing situation. The only question which arises is whether Appellant was negligent in handling his ship as he did under the circumstances.

It is not clear whether Appellant heard the third mate warn him of the presence of the HELLENIC BEACH. But this becomes immaterial in view of Appellant's own testimony that at 0155 he saw the lights of ships up ahead in the vicinity of the pilot station; and that the chief mate on the forecastle reported several ships. Since the weather was clear and the third mate was able to see the port side light and other running lights of the HELLENIC BEACH, it is reasonable to assume that Appellant saw, or should have seen, the approaching ship. He was on the bridge of the EXMOUTH and fully responsible for its navigation. If he did not see the other vessel even after the third mate called his attention to it, this was due to Appellant's own carelessness. If he did see the HELLENIC BEACH and had estimated its course, it would have readily become apparent that the HELLENIC BEACH was on a southeasterly course and that the two vessels were on crossing courses. Therefore, Appellant was bound to comply with the Rules of the Road, Articles 19, 22 and 23, which are as follows:

"Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

"Art. 22. Every vessel which is directed by these rules keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop or reverse."

Since the HELLENIC BEACH was three points on the starboard bow of the EXMOUTH and only its port running light was visible from the latter vessel, the EXMOUTH was undoubtedly the burdened vessel and required to keep clear, pass astern and stop if necessary, to avoid a collision. Even after it was observed that the bearing of the HELLENIC BEACH remained constant, Appellant did not make any attempt to change the course or reduce the speed of his ship in order to comply with the rules.

More than five minutes after the other ship had been sighted and while his ship was on course 275, Appellant gave the order "Hard left" to come to a course of 311. Understandably, this created some confusion and, after the course had been checked, Appellant changed the order to "Hard right." As the ship had already begun to swing to port, it was then too late to shift the rudder and thereby cause the EXMOUTH to pass astern of the HELLENIC BEACH. And time and space were not sufficient to allow the EXMOUTH to safely cross the bow of the HELLENIC BEACH. Consequently, the two ships collided as the EXMOUTH was beginning to swing to starboard.

Appellant had failed to take proper avoiding action when there was ample time and opportunity to do so. Seamanly appraisal and action would have prevented the collision. As was said in Cuba Distilling Co. v. Grace Line, Inc. (C.C.A. 2, 1944), 143 F. (2d) 499:

"But no emergency will excuse the absence of all clear thinking; after all, men, charges with responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril. Part of their equipment for their duties is some ability to think, be the situation ever so sudden and so grave."

Article 19 states that the burdened vessel must "keep out of the way of the other." This fundamental rule in crossing situations imposes on the burdened vessel the primary responsibility for avoiding collision. This duty is ordinarily performed by going under the stern of the privileged vessel, in obedience to Article 22 which requires the burdened vessel to "avoid crossing ahead of the other," unless the circumstances render it unsafe to do so. If the burdened vessel attempts to cross the bow of the other, she "takes the risk that the approaching vessel, while fulfilling her own obligation of keeping her course, may reach the point of intersection before she has passed it herself." The E.A. Packer (1891), 140 U.S. 360. "If she makes the attempt, and thereby brings about collision, she is in fault for not keeping out of the way of the privileged vessel." The George S. Shultz (C.C.A. 2, 1898), 84 Fed.508. If there is undue delay in directing her course to starboard, she will be held in fault. The Carroll (1868), 75 U.S. 302. Hence, whether Appellant was attempting to cross ahead or astern of the HELLENIC BEACH, he was at fault.

Appellant testified that he originally gave the order "311"; then told the helmsman "Steady her up; hold it"; and, finally, gave the order "Hard left" which was questioned by the third mate and helmsman. Judging from inferences drawn from other testimony not disputed by Appellant, the latter's testimony as to the sequence of commands does not seem plausible. The HELLENIC BEACH was on a southeasterly course and the collision occurred approximately a mile and a half southwest of the Overfalls Light Vessel about five minutes after the EXMOUTH had passed within one-third of a mile of the Light Vessel. This indicates that the collision took place south of the point at which the EXMOUTH would have been if she had remained on course 275. Hence, she at some time had steered to the left of course 275. If this was in obedience to Appellant's order of "Hard left," then Appellant is clearly at fault for not having acted more promptly when he could easily have passed astern of the HELLENIC BEACH. Appellant indicates that his order of "Hard left" was countermanded by the third Mate's order of "Hard right." If this is so, then there is nothing to account for the fact that the collision occurred to the south of an extension of the EXMOUTH's course of 275.

The third mate testified that the original order was "Hard left" and then was later changed to "Hard right". He also stated that the ship was swinging to starboard when the two ships collided. This seems to be the more plausible story. If the ship was going "Hard left" for two or three minutes, this would account for the location of the accident in a southwesterly direction from the Light Vessel. And if the rudder was shifted about two minutes before the collision, then the EXMOUTH would have begun to swing to the right when the collision took place. This would also corroborate the third mate's testimony that the angle of the keels of the two vessels was about 45/D/ at the time of impact. Both the location of the collision and the likelihood that the accident would have been avoided if the EXMOUTH had not first deviated to the left of course 275, indicate that the sequence of orders obeyed was "Hard left" and then "Hard right" rather than simply either "Hard left" or "Hard right."

Whether the erratic maneuvering of the EXMOUTH was due to Appellant's negligence, a misunderstood order to the helmsman, or the untimely interference of the third mate, the fact remains that Appellant did not at any time prior to the collision slacken speed, stop, or reverse.

Article 23 requires that the burdened vessel must, "if necessary, slacken her speed or stop or reverse." This is a method of performing her general duty to keep out of the way and is very strictly enforced. The Breakwater (1894), 155 U.S. 252; The New York (1899), 175 U.S. 187. She must reverse promptly in "the presence of danger or anticipated danger" (The Straits of Dover (C.C.A. 4, 1903), 120 Fed. (900) and "any delay in reversing" is "at her own risk" The Intrepid (D.C., S.D.N.Y. 1891), 48 Fed. 327).

Even in cases where there has been some doubt as to whether a vessel was on a definite course and thereby a privileged vessel, the courts have held that the potential burdened vessel should have at least slowed down and waited until the situation developed. The Senator Rice (C.C.A. 2, 1915), 223 Fed. 524.

Appellant unquestionably failed to keep the EXMOUTH clear of the HELLENIC BEACH which was the privileged vessel. His failure to do so was a violation of Article 19 of the Rules of the Road. And there is substantial evidence to show that Appellant had ample opportunity to steer his ship astern of the HELLENIC BEACH by either making proper course changes or slackening speed. Since he failed to take these precautions, he also violated Articles 22 and 23 of the Rules of the Road. Consequently, Appellant navigated the EXMOUTH in a grossly negligent manner.

Appellant believes that the order imposed in this case is unusually severe and out of proportion to the penalty meted out to the officer of the deck of the Eastwind as a result of a similar collision. (Point 2) Whether the ultimate result of this order will be a greater hardship on Appellant than the permanent reduction of numbers suffered by the officer of the deck of the Eastwind is impossible to determine. The latter officer is a comparatively young man and the penalty will have some effect throughout his entire career as an officer of the Coast Guard. In addition, the two cases are not exactly parallel. In the Eastwind case, there was no perversity present as herein and there was a heavy fog which prevented the officer of the deck from actually observing the other ship. Also, Appellant was required to act with a much higher degree of care because he was the Master of the EXMOUTH and has had many more years experience than the officer of the deck of the Eastwind.

CONCLUSION

For these reasons, it appears that there is substantial evidence to support both the charges of "misconduct" and "negligence". However, in view of Appellant's perfectly clear prior record as a Master for such a long period of time, the order imposed is considered to be excessive.

ORDER

Accordingly, it is ORDERED and DIRECTED that the order of the United States Coast

Guard Examiner dated 19 September, 1949, be, and the same is hereby modified to provide for the suspension of Appellant's License No. 16449 for a period of two (2) years from 19 September, 1949. The first year of this suspension shall be outright but the second year shall not be effective provided no charge under R.S. 4450, as amended (46 U.S.C. 239), is proved against Appellant for acts committed within one year of 19 September, 1950. This does not preclude Appellant from applying for a license, up to and including that of Chief Officer, during the unexpired period of outright suspension. As so modified, said order is AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 13th day of March, 1950.